IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1133 OF 2006

M/s. Dowell Leasing & Finance Ltd., 16/6, Aakar Builders, Byramji Town, Nagpur-440 013, through its Director Syed Riazuddin S/o. Syed Mohiuddin, age 36 years. .. Petitioner.

V/s.

1. Radheshyam B.Khandelwal Indian Inhabitant, having office at 1A, All Chambers, Medow Street, 1st Floor, Mumbai 400 023.

2. M/s. Anup Investments, carrying on Business in the name and style of M/s. Anup Investments having address of C/o. Mehta Industries, Plot No. 59, Gajanand Dhomal Marg, Valvie,Vasai (E), Dist.Thane.

3. Ajay Chajjer, carrying on business in the name of M/s.Akash Investments, having address of Near R.R.High School Jeela Peth, Jalgaon.

4. The Bombay Stock Exchange Ltd., Mumbai, through its Secretary, having its office at Dalal - Street, Fort, Mumbai. .. Respondents.

Mr.Sunil V. Manohar with Ms.Chandana Salgaocar Radia for the Petitioners.

Mr.S.U.Kamdar with Mr.Simil Purohit i/by Purohit & Co. for the Respondent No.1.

Mr.P.N.Modi with Mr. Sagar Divekar i/by Wadia Ghandy &

Co. for the Respondent No.4.

CORAM : F.I. REBELLO AND
A.V. MOHTA, JJ.

DATED : 23rd JULY, 2007.

JUDGMENT :- (PER F.I.REBELLO,J.)

. The Respondent No.1 had filed an Arbitration Reference against the present Petitioner and Respondent Nos. 2 and 3, under Bye-laws of the Bombay Stock Exchange, Mumbai. The Arbitral Tribunal passed an Award on 19.03.2002 against the Petitioner and Respondent Nos. 2 and 3. That Award was challenged by the Petitioner before this court in Arbitration Petition No. 264 of 2003. A learned Judge of this court was pleased to set aside the Award by Judgment dated 31.08.2004.

2. Respondent No.1 then filed Arbitration Reference No. 21 of 2005 against the petitioner. The petitioner herein filed an Application under section 16 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act'.) It was the petitioner's contention that there was no agreement between the Petitioner and the Respondent No.1, nor was there any contract or dealing or transaction between the petitioner and the Respondent No.1. The learned Arbitral Tribunal after hearing the parties by its order

dated 19.10.2005, upheld the objections and dismissed the Reference with costs. The order was styled as an Award. The Respondent No.1 aggrieved, preferred an Appeal under the Bye Laws of Mumbai Stock Exchange. After hearing the parties, the Arbitral Tribunal was pleased to allow the Appeal and set aside the Award dated 19.10.2005. The matter was referred back to the Tribunal to be decided on merits. The petitioner aggrieved by the order of the Tribunal dated 17.03.2006 has preferred the present petition.

3. We may firstly reproduce the two relevant Bye-laws of the Mumbai Stock Exchange, being Bye-Law 260 and the relevant portion of the Bye-law 274-A :

> "260. (1) An arbitration award may be set aside by the court on an application made under section 34 of the Arbitration and Conciliation Act, 1996 on the grounds mentioned in that section.
>
> (2) Whenever an award made under these Bye-laws and Regulations is set aside by the court, the matter shall be again referred to arbitration as provided in these Bye-laws and Regulations and the claims, differences and disputes shall be

decided by arbitration only."

"274A. Appeal Bench:

1. The Executive Director of the Exchange shall constitute one or more Appeal Benches, each comprising of five arbitrators from the panel of arbitrators constituted by the Governing Board under Bye-law 262(b). Out of the five arbitrators, three shall be nonmembers and two shall be members.

2. None of the arbitrators who have heard the reference or passed the award shall be a member of the Appeal Bench hearing an appeal against that award.

3. A party dissatisfied with an Award may appeal to the Appeal Bench against such Award within 15 days of the receipt of such award.

4. The party appealing shall pay the necessary fees and charges for preferring the appeal as may be fixed by the Governing Board from time to time.

> 5. No appeal shall be entertained by the Arbitration Secretary against an award of the Lower Bench, unless the appellant has first deposited the amount awarded with the Exchange. If the amount awarded is deposited by the member and the same is credited in a separate account as contemplated under Bye-law 259(A), the debit made to the account of the member as provided in the said bye-law shall be reversed."
>
> 6. .....
> 7. .....
> 8. .....
> 9. .....
> 10. .....
> 11. ....."

4. In the first instance, it is submitted that the Bye Law 274-A of the Stock Exchange is ultra vires the provisions of the Arbitration and Conciliation Act, 1996 and must yield to the provisions of the Act. The Bye-law to that extent is clearly inoperative and is liable to be struck down. It is then submitted that the Appeal under section 274 A of the Bye laws was not maintainable as the order of the Arbitral Tribunal dated 19.10.2005 was in fact not an Award but an order, considering section 16 of the Act, which would be appealable under section 37 (2) of the Act. The Appellate Tribunal in entertaining the said proceedings,

as if, the challenge was to an Award acted without jurisdiction and consequently that order is liable to be set aside.

5. On the other hand, on behalf of the Respondent No.1 the learned counsel submits that the petition filed is not maintainable and consequently ought to be dismissed. It is submitted that if the petitioner was aggrieved by the order of the Appellate Tribunal, the remedy for the petitioners would be to prefer an appeal under section 37 (2) of the Act. It is next submitted that all that Bye-Law 274 -A provides for, is a second submission to arbitration, at the instance of the party dissatisfied with the Award of the Arbitral Tribunal. Such a Bye-law providing for a second submission to arbitration even though styled as an Appeal is in no way in conflict with the provisions of the Arbitration and Conciliation Act, 1996.

6. On behalf of the Respondent No.4, their learned counsel submits that the petitioner having participated in the proceedings and submitted themselves to the jurisdiction of the Arbitral Tribunal and the Appellate Tribunal, is now precluded from challenging the jurisdiction of the Appellate Tribunal.

7. The questions for determination, based on the contention urged by the parties are as under :

(i) Is a writ petition on the facts of the case maintainable.

(ii) Whether Bye law 274-A is ultra vires the provisions of the Arbitration and Conciliation Act, 1996.

(iii) Was the appeal preferred by the Respondent No.1 against the order rejecting the reference before the Appellate Tribunal maintainable or was the proper remedy under Section 37(2) of the Act.

8. We shall first deal with the issues as to whether a writ petition would be maintainable. In the instant case, one of the reliefs sought in the petition by way of prayer clause (B) is to declare Bye-Law No.274-A and Regulation No.15.23 as ultra vires Article 14 of the Constitution of India, as being irreconcilable with Bye -law No.260 and as being further ultra vires the provisions of Arbitration Act, 1996 and for a further declaration that the provisions of Bye law

No.274A and Regulation 15.23 are unconstitutional and unenforceable and to strike down the same. At the hearing, no arguments have been advanced in respect of Regulation 15.23.

. Respondent No.4 has been held to be State within the meaning of Article 12 of the Constitution of India. There is also no dispute that the Bye-laws have been framed under powers conferred on Respondent No.4 by the provisions of the Securities Contracts (Regulation) Act, 1956. It would, therefore, be clear that the writ petitions as filed would be maintainable, as the petition is not merely to challenge the order of the Appellate Tribunal but its very jurisdiction to entertain the appeal and the very challenge to the Bye Law which permit an appeal. The second aspect of the matter is the terminology of Bye Law 274-A. It is clear that an appeal lies against an Award. The Act uses various terminologies like "Award", "Order" and "decision". That issue had come up for consideration before a learned Judge of this Court in **M/s. Anuptech Equipments Pvt.Ltd., V/s. M/s.Ganpati Co-op.Housing Society Ltd., & Ors., 1999 (2) Bom.C.R.331.** It was held that the expression ‘Award" and "Order" are different expressions used in the Act of 1996. An Award can be an interim Award or a final Award. An Award, however,

decides partly or fully the subject matter of the reference. An order made under section 16 of the Arbitration and Conciliation Act, 1996 is not an Award which is capable of being challenged under section 34 of the Act, 1996, but can be challenged whilst challenging the Award, in those cases where the Arbitral Tribunal had rejected the plea as to the jurisdiction. Under section 37 (2) of the Act of 1996 an appeal would lie if the Tribunal holds that it has no jurisdiction.

9. It is no doubt true that the learned counsel for Respondent No.4 had drawn our attention to the judgment of the Supreme Court in **S.B.P. & Co. vs. Patel Engineering** in **2005(8) SCC 618** and most specifically to paragraph 45 and direction (vi) of the para-47, which read as under :

> "45. It is seen that some High Courts have proceeded on the basis that any order passed by an Arbitral Tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution. We see no warrant for such an approach. Section 37 makes certain orders of the Arbitral Tribunal appealable. Under section 34, the aggrieved party has an avenue for ventilating its grievances against

the award including any in-between orders that might have been passed by the Arbitral Tribunal acting under section 16 of the Act. The party aggrieved by any order of the Arbitral Tribunal, unless has a right of appeal under section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The Arbitral Tribunal is, after all, a creature of a contract between the parties, the arbitration agreement, even though, if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the Arbitral Tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the Arbitral Tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution. Such an intervention by the High Courts is not permissible."

"Direction (vi) of Para 47.

(vi) Once the matter reaches the Arbitral Tribunal or the sole arbitrator, the High Court would not interfere with the orders passed by

> the arbitrator or the Arbitral Tribunal during the course of the arbitration proceedings and the parties could approach the Court only in terms of Section 37 of the Act or in terms of Section 34 of the Act."

. It would be clear from a reading of the paragraph as also the directions, the Hon'ble Supreme Court has held that the High Courts ought not to invoke its extra-oridnary jurisdiction under Article 226 and 227 in respect of orders passed in pending arbitral proceedings. This is more so in respect of proceedings in respect of which a remedy is available under the Act. The judgment has not taken a view that no writ can go to an Arbitral Tribunal or that Arbitral Tribunal is not a person to whom a writ cannot be issued.

10. A learned single Judge (Rebello,J.) in **M/s.Anuptech Equipments Pvt. Ltd., (supra)** after considering the various provisions of the Act, 1996 has held that the writ jurisdiction can be invoked in the matter of termination of proceedings and if there be no remedy available to a party under the Act of 1996. In **Vimal Madhukar Wasnik (Dr.) Nagpur vs. Sole Arbitrator, the Honourable Shri Justice M.S.Deshpande & Ors., 2006 (1) Bom. C.R. 419,** the Division Bench again to which

one of us (Rebello, J), was a party, reiterated the view that in a case where the proceedings are terminated and no remedy is available to a party under the provisions of the Act, 1996, it will be open to the party aggrieved to invoke the extra-ordinary jurisdiction of this court. If we consider para 45 in the judgment of Patel Engineering Ltd., (Supra); the language used is 'an order passed by an arbitral Tribunal during arbitration'. The judgment has not taken a view, that where proceedings are terminated, no petition would lie.

. If the order of the Arbitral Tribunal is considered to be an order under section 16, then the Appellate Tribunal could not have exercised jurisdiction. Against the order of Appellate Tribunal, there would be remedy available to the petitioner under section 37(2) of the Act, 1996 as the remedy under section 37(2) would be a remedy against the order of the Tribunal and not the Appellate Tribunal. The other aspect of the matter is that challenge to the vires of a bye law cannot be considered in a challenge to the award under section 34 of the Act and the recourse could be only to the extraordinary jurisdiction under Article 226 of the Constitution of India, in the absence of any mechanism under the provisions of the Securities Contracts (Regulation) Act.

. In our opinion, therefore, considering the discussion, it cannot be said that on the facts of this case the petition as filed is not maintainable.

11. Is Bye law 274-A, ultra vires the provisions of the Act of 1996. To understand the controversy we may refer to the position of law as it earlier stood and understood by the decision of the various High Courts. The Calcutta High Court in **Heeralal Agarwalla & Co. vs. Joakim Nahapiet & Co.Ltd., AIR 1927 Calcutta 647** was considering a clause in a contract between the parties that all disputes arising out of it should be from time to time be referred to two arbitrators, who should have power to call in a third, the award of any two of them to be binding and conclusive, with a proviso that in case either party was dissatisfied with the award, they might appeal to the appeal committee of the London Corn Trade Association subject to the rules of that Association. It was sought to be contended that though there is nothing in the Indian Arbitration act to prevent the parties from agreeing that the Award made by an umpire should be reviewed or revised or considered by an Appellate Authority, the Award made by such appellate authority cannot be filed in the Court. Whilst answering the issue, C.C.Ghose, J, in his opinion was

pleased to observe as under :

> " I think the contention put forward on behalf of the appellants is correct and that the committee are really a fresh set of arbitrators called in by the parties. In other words, the contract contains as it were two submissions or a submission within a submission".

. Buckland, J. - in his opinion relying on English Authority observed " But successive awards are not per se to be condemned .....".

. A similar issue came up for consideration before a learned single Judge of this court in **Fazalally Jivaji Raja vs. Khimji Poonji & Co., AIR 1934 Bombay 476.** This was under the Arbitration Act, 1899. It was argued before the learned Judge that section 11 of the Act in terms contemplates an Award made by arbitrators or an umpire, and excludes an Award made by the board of directors in Appeal from the Award of the umpire. After considering various authorities as also the practices of various Boards, the learned Judge was pleased to hold that there was nothing inconsistent to have a second submission.

. A division bench of the Madras High Court had an occasion to consider the Bye-laws of Madras Oil and Seeds Exchange (Pte.)Ltd., in the case of **M.A. and Sons**

vs. Madras Oil and Seeds Exchange Ltd., AIR 1965 Madras 392. It was under the Arbitration Act of 1940. There also in terms of the bye laws, against the order of the Arbitral Tribunal, an appeal lay to the appellate tribunal. A contention was urged that appeal itself was ultra vires as it was opposed to section 10 of the Indian Arbitration Act. After nothing the judgments of the Calcutta High Court, the learned Bench was pleased to observe as under : "We are dealing with a private dispute, and the obligation to refer the dispute to arbitration results from the contract between the parties, and not because of any law. Secondly, and more importantly, the contract itself provides that if at any time after the contract has come into existence and is in dispute, the bye-laws of the Madras Oil and Seeds Exchange Pvt.Ltd., under go modifications or alterations, and the parties will abide by those bye-laws subject to such modification".

. The learned Bench held that these are different stages of arbitration, such as, from a single Arbitrator to a committee of appeal, etc. and it is the award which finally emerges from this procedure, which is conclusive as between the parties, and not liable to be set aside, expect as provided for under section 30 of the Arbitration Act 10 of 1940. The court held,

consequently, the provision for appeal is not ultra vires the law of Arbitration as contained in the Act 10 of 1940.

. The position of law before the Act of 1996 would be that as provision for arbitration is a part of the term of contract between the parties a provision for a second submission or in the nature of an appeal from the first submission has been held not to be incompatible.

12. In Re An Arbitration between **Keighley, Maxsted & Co. and Bryan Durant & Co., Queen's Bench Division I.Q.B.405** (the Court of Appeal in) was considering a provision whilst provided that in case either party should be dissatisfied with the award, they might appeal to the appeal committee of the London Corn Trade Association. Lord Esher, M.R. in his opinion observed : "That the parties have not only agreed that the committee should be the umpire, but they had agreed that it should act according to the rules of the London Corn Trade Association, which were well known. These being the terms as to the decision of their dispute to which the parties agreed, they went before the committee of five, who were acting for the full committee as umpire".

. Russell on Arbitration, Twenty-Second Edition

has noted the provisions of Section 67 of the English Arbitration Act, 1996. Section 70 of the English Arbitration Act,1996, is the provision applicable to an application of appeal under sections 67, 68 or 29. Section 70 provides that an application or appeal may not be brought if the applicant or appellant has not first exhausted -- any available arbitral process of appeal or review. In other words, the English Law of Arbitration specifically provides that when there is a provision for a second submission to Arbitration, an appeal would not lie when the remedy of the second submission is not availed of. The English Law, therefore, recognizes that a provision for a second submission is not incompatible with the provisions of the Arbitration Act, 1996, which is also modelled on the Uncitral Code.

13. It would be clear, therefore, that courts in our country have not disapproved a second submission to arbitration.

. At this stage, we may note that our attention was invited by the learned counsel for the petitioner to the judgment of the Supreme Court in **M/s. Centrotrade Minerals & Metal. Inc. vs. Hindustan Copper Ltd., JT 2006 (5) SC 507**. One of the contentions which was

considered by S.B.Sinha, J. was an issue as to whether a multi-tier arbitration is consistent with the provisions of the Act, 1996. The learned Judge on consideration of the law, held that under the Act of 1996 a multi-tier arbitration is inconsistent. Tarun Chatterjee J. on the other hand relying on the view of the Calcutta, Bombay and Madras High Courts, is of the considered opinion that the two tier arbitration option is not inconsistent with the provisions of the Act, 1996. We are informed at the bar that the matter has been referred to a larger bench.

14. With this background we may now answer the contention advanced that the Bye-law 274 A is ultra vires the provisions of the Act, 1996. Bye-law 260 specifically sets out that the Arbitration Award may be set aside under section 34 of the Act, 1996. Bye-law 274 used the expression "A party dissatisfied with an Award may appeal to the appellate bench....." In other words, the language is not mandatory or directory, but it is open to any of the parties, if aggrieved by the Award of the Tribunal, in stead of challenging the Award under section 34, to prefer an appeal in terms of the bye-laws which forms a part of their contractual terms. We are therefore, of the considered opinion that Bye Law 274-A is not ultra vires the provisions of the Act of

1996.

15. Another aspect that has to be considered is whether a provision for a second submission or an appeal as described pursuant to the bye-laws framed under the Securities Contracts (Regulation) Act, considering section 2(4) of the Arbitration and Conciliation Act, 1996, would prevail over the provisions of the 1996 Act. Section 2(4) of the Arbitration Act provides that Part I of the Arbitration Act, 1996 shall apply to every arbitration under any other enactment as if the arbitrations were pursuant to an arbitration grant and as if the other enactment was an arbitration agreement. Section 2(4) of the Arbitration and Conciliation Act, 1996 reads as under :

> "Section 2(4) : This part except sub-section (1) of section 40, sections 41 and 43 shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement except in so far as the provisions of this Part are inconsistent with that other enactment or with any rules made thereunder."

. Under the provisions of the Securities Contracts Act, distinct powers have been conferred to make rules and bye-laws. Section 30 is the power conferred on the Central Government to make rules for the purpose of carrying into effect the objects of the Act. Section 30 (2)(f) provides for the manner in which the bye-laws are to be made or amended and it further provides that before being so made or amended be published for criticism. Under section (8)(1) power has been conferred on the Central Government after consultation with the governing bodies of stock exchange in general or with the governing body of any stock exchange in particular, to make rules or amend any rules in respect of matters specified under section 3(2) of the Act. Section 3(2) is a power on behalf of the stock exchange to make an application for being recognised under this Act. By section 7A power has been conferred on the stock exchange to make rules or amend any rules for the matters provided thereto. Under section 31, the Exchange Board of India has been conferred powers to make regulations consistent with the provisions of the Act and the rules made thereunder to carry out the purpose of the Act. Under section 9 power has been conferred on the Stock Exchange subject to the provisions of approval of the Securities and Exchange

Board to make the bye-laws for the regulations and control of the contracts.

16. We may now consider the nature of various bye-laws. Provisions for framing of bye laws is also provided for under the Maharashtra Co-operative Societies Act. The nature of the bye law came up for consideration in **Babaji Kondaji Garad vs. Nasik Merchants Co-operative Bank Ltd., Nasik and others (1984) 2 Supreme Court Cases 50;** while considering the bye-laws made under that Act, the Supreme Court observed as under :

> "Bye-law of a co-operative society can at best have the status of an Article of Association of a company governed by the Companies Act, 1956 and as held by this Court in **Co-operative Central Bank Ltd. vs. Additional Industrial Tribunal, Andhra Pradesh,** the bye-laws of a co-operative society framed in pursuance of the provision of the relevant Act cannot be held to be law or to have the force of law. They are neither statutory in character nor they have statutory flavour so as to be raised to the status of law. Now if there is any conflict between a statute and the subordinate

> legislation, it does not require elaborate reasoning to firmly state that the statute prevails over subordinate legislation and the bye-law if not in conformity with the statute in order to give effect to the statutory provision the rule or bye-law has to be ignored. The statutory provision has precedence and must be complied with."

In the **Co-operative Central Bank Ltd., vs. The Additional Industrial Tribunal, Andhra Pradesh & Ors. 1969 (2) Supreme Court Cases 43,** while examining the nature of the bye-laws made by the Co-operative Societies, the Supreme Court was pleased to observe as under :

> "It has no doubt been held that, if a statute gives power to a Government or other authority to make rules, the rules so framed have the force of statute and are to be deemed to be incorporated as a part of the statute. That principle, however, does not apply to bye-laws of the nature that a co-operative society is empowered by the Act to make. The bye-laws that are contemplated by the Act can be merely those which govern the internal management, business

> or administration of a society. They may be binding between the persons affected by them, but they do not have the force of a statute."

In **Dr. Indramani Pyarelal Gupta and ors. vs. W.R.Natu and ors. , AIR 1963 Supreme Court 274,** the issue that was being examined was as to whether power conferred by a bye-law framed under section 11 or 12 of the Forward Contracts (Regulation) Act, 1952 was not one that was conferred "By or under this Act or as may be prescribed" . Addressing itself on the question, the Supreme Court held - "The meaning of the words "under the Act" is well known. "By" an Act would mean by a provision directly enacted in the statute in question and which is gatherable from its express language or by necessary implication therefrom. The words "under the Act" would, in that context signify what is not directly to be found in the statute itself but is conferred or imposed by virtue of powers enabling this to be done; in other words, bye-laws made by a subordinate law-making authority which is empowered to do so by the parent Act. The distinction is thus between what is directly done by the enactment and what is done indirectly by the rule making authorities which are vested with powers in that behalf by the Act.". Proceeding further, the Supreme Court then observed : "Thus the utmost could be said

would be that though normally and in their ordinary signification the words "under the Act" would include both "rules" framed under section 28 as well as "bye-laws" under Section 11 or 12, the reference to "rules" might be eliminated as tautologous since they have been specifically provided by the words that follow. ....." .

. Subba Rao, J, in the minority judgment, was examining the nature of the subordinate legislation and its various forms. The learned Judge observed as under :

> Para (41) : Subordinate or delegated legislation takes different forms. Subordinate legislation is divided into two main classes, namely, (i) statutory rules, and (ii) bye-laws or regulations made (a) by authorities concerned with local government, and (b) by persons, societies, or corporations. The Act itself recognizes this distinction and provides both for making of the rules as well as bye-laws. A comparative study of Ss. 11 and 12 whereunder power is conferred on the Central Government and recognised associations to make bye-laws on the one hand, and S. 28, whereunder the Central Government is empowered to make rules on the

other, indicate that the former are intended for conducting the business of the association and the latter for the purpose of carrying into effect the objects of the Act. In considering the question raised in this case this distinction will have to be borne in mind."

17. The language of section 2(4) of the Act, uses the expression "under any other enactment" and the second part is "as if that other enactment were an arbitration agreement except in sofar as the provisions of this Part are inconsistent with that other enactment or with any rules made thereunder". Whereas, so far as, the first Part is concerned, an arbitration under any enactment would mean a provision for arbitration is directly found under any other enactment and or if the meaning is stretched then also arbitration provided by any subordinate legislation under the enactment. Insofar as latter part is concerned, the provisions for arbitration will be treated as if it was an arbitration agreement except insofar as the provisions of this Part are inconsistent with that other enactment or with any rules made thereunder. In other words, the provisions of this part would not apply if the provisions of this Part are inconsistent with the other enactment or any

rules made thereunder. A reading thereof would indicate that the inconsistency can only be between enactment and the rules and not any other form of subordinate legislation.

18. In **Pramod Verma vs. State of Uttar Pradesh, AIR 1985 Supreme Court 167,** the Supreme Court was considering the expression ‘Act’ and ‘enactment’. The Supreme Court making a distinction between the two observed as under :

> "The word ‘enactment’does not mean the same thing as ‘Act’. Act means the whole Act, whereas a section or part of a section may be an enactment".

It would be clear therefore, that there is a distinction between expression ‘enactment’ and ‘an Act’.

. In **T.B.Ibrahim vs. The Regional Transport Authority , AIR 1953 Supreme Court 79,** the Supreme Court noticed the distinction between bye-laws and the rules and observed as under :

> "Reliance was placed on a passage at page 299 of Craies on Statute Law as laying down that a

by-law must not be repugnant to the statute or the general law. But by-laws and rules made under a rule making power conferred by a statute do not stand on the same footing, as such rules are part and parcel of the statute itself.

. In **Atlas Cycle Industries Ltd., vs. The State of Haryana, AIR 1972 Supreme Court 121,** the Supreme Court was considering the power to issue notification and the words "rules, bye-laws, orders and directions and powers". Referring to section 21 of the General Clauses Act, the Court held that it speaks of power to issue notifications, orders, rules or bye-laws and it is therefore, apparent that the power to issue notification, orders, rules or bye-laws refers to different and separate methods of expression of exercise of power under the statute. In that case the court observed that the bye-laws are entirely different from notification imposing tax.

. In **Paritosh Bhupeshkumar Sheth case (supra),** the Supreme Court was considering the distinction between bye-laws and regulations. We may carefully refer to the following observations :

"It is a common legislative practice that the

Legislature may choose to lay down only the general policy and leave to its delegate to make detailed provisions for carrying into effect the said policy and effectuate the purposes of the statute by framing rules/regulations which are in the nature of subordinate legislation. Section 3(39) of the Bombay General Clauses Act, 1904, which defines the expression ‘rule’ states : "Rule shall mean a rule made in exercise of the power under any enactment and shall include any regulation made under a rule or under any enactment’. It is important to notice that a distinct power of making bye-laws has been conferred by the Act on the State Board under Section 38. The Legislature has thus maintained in the statute in question a clear distinction between ‘bye-laws’ and ‘regulations’. The bye-laws to be framed under section 38 are to relate only to procedural matters concerning the holding of meetings of the State Board, Divisional Boards, and the Committee, the quorum required, etc., More important matters affecting the rights of parties and laying down the manner in which the provisions of the Act are to be carried into effect have been reserved to be provided for by regulations made under Section

> 36. The Legislature, while enacting Sections 36 and 38, must be assumed to have been fully aware of the niceties of the legal position governing the distinction between rules/regulations properly so called and bye-laws. When the statute contains a clear indication that the distinct regulation making power conferred under Section 36 was not intended as a power merely to frame bye-laws, it is not open to the Court to ignore the same and treat the regulations made under Section 36 as mere bye-laws in order to bring them within the scope of justifiability by applying the test of reasonableness."

19. From the discussion noted above, it would be clear that there is a distinction between a rule, regulation, order, bye-law and notification. Each has to be made in terms of powers conferred under the Act. They may be law made under an enactment or rules or bye laws made for the internal administration. This distinction has to be noted as there are various forms of subordinate legislation.

20. The nature of the bye-laws made by the Stock Exchange have been considered by the Supreme Court in

Bombay Stock Exchange vs. Jaya I. Shah and anr. (2004) 1 Supreme Court Cases 160. While considering the issue, the court observed as under :

> Rules, bye-laws and regulations are made by the Exchange. They, although are not made under a statute but having regard to the scheme as also the purport and object thereof, have a statutory flavour. Bye-laws are required to be made for regulation and control of contracts, whereas rules relate in general to the constitution and management of a stock exchange.

. A learned division bench of this court, however, in **Stock Exchange,Mumbai vs. Vinay Bubna** as proceeded to hold that the bye-laws made under the stock exchange are statutory, having the force of law and to the extent of inconsistency with the provisions of the Arbitration Act, 1996; the same would prevail. In our opinion, considering the judgment of the Supreme Court in **Jaya I. Shah and another (supra),** where the Supreme Court has held that they are not made under a statute but having regard to the scheme as also the purported object of the Act they have a statutory flavour that would no longer be a good law.

21. For the purpose of discussion and after the judgment of the Supreme Court in Jaya I Shah, it will not be possible for this court to place the bye-laws made by the stock exchange on the same footing as rules made under the rule making power conferred on it. The rules and regulations made by the Exchange, have a character of their own. The provision for an appeal or second submission, therefore, at the highest would be termed as a contract between the parties. As we have held that such a provision is not incompatible, bye law 274-A cannot be said to be ultravires the provisions of the Act of 1996.

. It will, therefore, be difficult to accept a contention that the statutory power of appeal under section 37 or for that matter, the power to challenge Award under section 34, will have to give away to the bye-laws made by the stock exchange. The bye-laws made by the stock exchange is neither ‘enactment’ nor rule. They at the highest have a statutory flavour. Section 2(4) of the Act of 1996 would not be attracted.

22. Viewed in this context and looking at the bye-law 260 and bye-law 274-A, it will be possible to harmoniously construe them. Under bye-law 260, an Award

made by the Tribunal is subject to a challenge under section 34 of the Arbitration and Conciliation Act, 1996. In sofar as bye-law 274-A is concerned, it is the nature of an additional submission or a second arbitration. It is open to the parties to the contract, either to opt for the same or not to opt for the same. If they opt for a second arbitration under the Bye law 274-A, then it is the Award passed in the second arbitration under Bye laws 274-A which would be an award, which would be capable of being challenged under section 34 of the Act. So read, there would be no conflict.

23. Having said so, the third question will have to be answered, namely, whether the Appeal filed before the Appellate Authority of the Stock Exchange was maintainable. This Court **in M/s. Anuptech Equipments Pvt.Ltd., vs. M/s.Ganpati Co-op. Housing Society Ltd., AIR 1999 Bombay 219,** noted the different expressions used in the Act of 1996. Under section 16 of the Act, 1996, the decision referred is an ‘order’ and not ‘an award’. The decision of the arbitral Tribunal, holding that there was no provision for arbitration, was an order and not an award . An appeal under bye-law 274-A would lie at the instance of a party dis-satisfied with an Award made under the bye-law 260. The decision

rendered by the Tribunal, at the first instance being an order, no appeal lay nor could the respondents have invoked the provision for second arbitration. The challenge to that order would be available only under section 37 of the Arbitration and Conciliation Act, 1996. Once that be the position, the assumption of jurisdiction and the order, setting aside the order by the first tribunal dated 17th March, 2006 and remitting the matter to the arbitral tribunal, would be without jurisdiction. Ordinarily and as set out, considering, section 5 of the Act and other provisions, this court would not interfere with the orders in exercise of its extra ordinary jurisdiction. In the instant case, we have entertained the present petition for reasons already discussed. In the instant case, however, the challenge to the party was available under section 37(2) of the Act, 1996. Once that be the case, the second arbitration as invoked, was without the authority of law and as such the order dated 19th October, 2006 would have to be set aside. It will be open to the Respondent, considering the power conferred under section 37(2) to challenge that order by preferring an appeal.

24. Rule is made partly absolute accordingly. There shall be no order as to costs.

(F.I.REBELLO,J.)

(A.V.MOHTA,J.)

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